AN ARTICLE ON RIGHT OF PREEMPTION

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In this article I am dealing with the right of pre-emption. This right is available to Muslims under their customary right and apart from this even a non-Muslim can claim the same under Statues of state.

The right of Preemption also known as "Shufaa" is a right which the owner of an immovable property possesses to acquire by purchase another immovable property which has been sold to another person.

Basically this right is available to one so that a stranger is not introduced in neighbor or the family which may cause a hindrance to ones privacy.

In this article i am dealing with what kind of this right of Preemption is? Whether it is a statutory right or a customary right? Whether the law recognizes it? When did this right originate? What is the nature of this right and what is its object? Whether such right is beneficial or not?

Apart from this who can claim this right? What are the formalities required and when this right vanishes? The different opinions of Courts and controversy regarding it.

ORIGIN OF PRE-EMPTION

The history of preemption in India has been given by Sir John Edge in Digamhar Singh v. Ahmad Said Khan.

Pre-emption in village communities in British India had its origin in the Mohammedan law as to pre-emption, and customs of pre-emption were adopted after the Mughal conquest. In some cases the sharers in a villa e adopted or followed the rules of the Mohammedan law of the preemption, and in such cases the custom of the villa e follows the rules of the Mohammedan law of pre-emption. In other cases, where customs of preemption exists, each villa e community has a custom of preemption which varies from the Mohammedan law of preemption and is peculiar to the villa e in its provisions and its incidents. A custom of preemption was doubtless in all cases the result of agreement amongst the share-holders of the particular villa e, and may have been adopted in modern times and in villa es which were first constituted in modern times. Ri ht o

preemption has in some provinces been given by Acts of the Indian Legislature. Right of pre-emption has also been created by contract between the sharers in a village. But in all cases the object is as far as possible to prevent strangers to a village from becoming sharers in the village. Right of preemption when they exist are valuable rights, and they depend upon a custom or upon a

contract, the custom or the contract, as the case may be, must, if disputed, be proved.[1]

NATURE OF PRE-EMPTION

Mahmood J. observes in Gobind Dayal's cases :

> The law of pre-emption is essentially a part of Muhammadan in jurisprudence. It was introduced into Indian by Muhammadan Judges who were bound to administer the Muhammadan law. Under their administration it became, and remained for centuries, the common law of the country, and was applied universally both to Muhammadans and Hindus, because in this respect the Muhammadan law makes no distinction between persons of different races or creeds. "A Musalman and a Zimmee being equally affected by principles on which shafa or right of pre-emption is established, and equally concerned in its operation, are therefore on an equal footing in all cases regarding the privilege of shafa." (Hamilton's Hedaya, vol.III, p.592.) What was the effect of this? In course of time, preemption became adopted by the Hindus as a custom.[2]

The law of pre-emption is based clearly upon the texts of Islamic law, and while there seem to foreign element in it,[3] it is a well-established doctrine in India. It was adopted by Islam, in general, to prevent the introduction of a stranger among co-sharers and neighbours likely to cause both inconvenience and vexation.[4] In Govind Dayal v. Inayatullah, Mahmood, j. defined pre-emption (shufa) as :

> A right which the owner of certain immovable property possess, as such, for the quiet enjoyment of that immovable property, to obtain, in substitution for the buyer, proprietary possession of certain other immovable property, not his own, on such terms as those on which such latter immovable property is sold to other person.[5]

Three things are, therefore, requisite: (i) the pre-emptor must be the owner of immovable property; (ii) there must be sale of certain property not his own; (iii) the pre-emptor must stand in a certain relationship to the vendor in respect of the property sold. If these conditions are satisfied, he has the right to be substitute for the purchaser.

The free India found that the law of preemption prevailed in various parts of the country. In some parts it existed as part of the Muslim personal law, in other parts it was based on custom, which still in some other parts, it existed under statutes, and among some people it had come into existence by contract. Thus, the law of preemption has the following four sources :

> (i) In the greater part of the country it existed among the Muslims as part of their personal law, i.e., where the law of pre-emption is neither territorial nor customary it is applicable as between Muslims as part of their personal law.[6]

(ii) It existed in certain parts of the country under statutes. Thus, in Punjab it existed under the Punjab Pre-emption Act, 1915, in Agra under the Agra Pre-emption Act, 1922, and in Oudh under the Oudh Laws Act, 1876. In these areas the statutory law of preemption applies to both Muslims and non-Muslims, and the Muslims law of pre-emption does not apply even to Muslims. (This should be read subject to the saving contained in the Agra Pre-emption Act under which it is laid down that the Muslim law of pre-emption will apply where the vendor and the pre-emptor are both Muslims).

(iii) In Bihar, Sylhet, and certain parts of Gujarat (such a Surat, Broach of Godhra), the right of pre-emption is recognized by custom among Hindus who were either domiciled there or were natives of these parts. In these areas it was the Muslim law of pre-emption which applies to Hindus except in so far as it was modified by custom.[7] Where pre-emption is based on custom it is part of lex loci,[8] and is enforceable irrespective of the religions of the parties concerned.

(iv) Among some people it came into existence by contract. The right of pre-emption was created by contract among the sharers in a village.[9] For instance, a Hindu vendee and a Muslim vendor may agree that the Muslim law of pre-emption which applies to the vendor and his sharers would also apply the vendee.

The question whether the right of pre-emption is violative of Article 19(1) (b) of the Constitution of India has come up before the Supreme court in two cases,[10] in one the statutory right of pre-emption and in another the customary right of pre-emption was challenged. Both cases related to the right of pre-emption on the basis of vicinage. In both cases, the Supreme Court came to the conclusion that the right of pre-emption on the basis of vicinage imposed unnecessary restrictions on the vendor's right to sell the property to a purchaser of his choice, and, therefore, was unconstitutional.

In Avadh Behari v. Gujadhar,[11] the Supreme Court gave effect to the right of pre-emption based on co-ownership in joint property. However, in this case the constitutional validity of the law of pre-emption was not challenged before the Supreme Court. In fact, the constitutional validity could not have been challenged in this case, as it was a pre-constitutional case, where the leave to appeal had already been granted by the Privy Council. After the coming into the force of the Constitution of India, the appeal was has heard by the Supreme Court. Thus, from this case, no inference can be drawn that the Supreme Court had upheld the Constitutional validity of the law of pre-emption based on co-ownership.

In Bishan Singh v. Khazan Singh the court summarised rules of pre-emption in India :

(1) The right of pre-emption is not a right to the thing sold but a right to the offer of a thing

about to be sold. This right is called the primary or inherent right.

(2) The pre-emptor has a secondary right or a remedial right to follow the thing sold.

(3) It is a right of substitution but not of re-purchase, i.e., the pre-emptor takes the entire bargain and step into the shoes of the original vendee.

(4) It is a right to acquire the whole of the property sold and not a share of the property sold.

(5) Preference being the essence of the right, the plaintiff must have a superior right to that of the vendee or the person substituted in his place.

(6) The right being a very weak right, it can be defeated by all legitimate methods, such as the vendee allowing the claimant of a superior or equal right being substituted in his place.[12]

Classification Of Pre-Emptors Or Who Can Pre-Empt

The right of pre-emption may be classified on the basis of the persons who can claim the right.

(i) The Shafi Sharik or co-owner in the property. This is a right f pre-emption of a co-sharer of the property. Obviously, no right of pre-emption arises on the sale of leasehold.[13] The right of pre-emption can be claimed only by a full owner.

(ii) The Shafi Sharik or a participator in the appendages. This is a right of pre-emption of a participator in immunities and appendages, such as a right of way, or right to discharge water.[14] On the basis that that the branches of his tree project over the land of a neighbor of the owner of the tree cannot claim the right of pre-emption as Shafii Khalit on the sale of that land.[15] Similarly, the mere fact that the owners of lands have the any right to draw water from government water-course does not give them any right of pre-emption. The right of pre-emption as Shafii Khalit cannot be claimed as Shafii Khalit cannot be claimed on the basis of easement of light and air. The right of pre-emption as shafii khalit exists only in respect of right of way and right to water and in respect of no other easement.[16]

(iii) The Shafi-i-jar or owner of an adjoining property. This is a right of pre-emption on the basis of nighbourhood, or the right of the owner of the adjoining immoveable property. This right does not belong to a tenant or to a person, who is in possession of property without having ownership in it. Thus, a wakif of mutawali has no right of pre-emption on the basis of shafi-i-jar, since the title of property does not vest in either of them but in God,[17] and God, too, has no right of pre-emption. Even before Supreme Court decision[18] holding the right of pre-emption on the basis of vicinage as unconstitutional, the right of pre-emption of

a shafi-i-jar did not extend to larger estates, such as zamindars and jagirs, but was restricted to houses, gardens and small parcels of land.

Under the Hanafi law, the pre-emptor of the same class has the right to pre-empt in equal proportions, even though they own unequal sharers. But under the Shafii law, even the right of pre-emption of the same class is in proportion to their share in the property. Among the pre-emption of the same class, no distinction is made.

Nearness may be recognized by customs.[19]

The right of pre-emption arises from full ownership,[20] and it is immaterial that a pre-emptor is not in possession of his property. It is ownership and not possession which gives rise to the right of pre-emption. There is no right of pre-emption on the sale of leasehold, whether of house or land.

WHEN DOES THE RIGHT OF PRE-EMPTION ARISE

The right of pre-emption arises only in two types of transfer of property, viz., sale and exchange. It does not arise in respect of transfer of any other type. When it arises in respect of sale, then sale must be complete, bona fide and valid.[21] the Allahabad High Court held that the transfer of property by a husband to his wife in lieu of dower is sale and, therefore, the right of pre-emption arises[22], while the Oudh Chief Courts has held that it is a hiba-bil-iwaz, and therefore, the right of pre-emption does not exist[23]. Similarly, the right of pre-emption arises in respect of exchange when it is complete, bona fide and valid. Thus, the right of pre-emption will not arise in respect of an exchange of property between two persons, if the exchange is subject to an option at any time during their life time.

The right of pre-emption does not exist in respect of Gift, Sadaqah, Wakf, Inheritance, Bequest or Lease[24]. It does not apply to a mortgage also, but if a mortgage is foreclosed, then the right of pre-emption arises. The right of pre-emption does not arise in respect of a lease even when it in perpetuity.

It is established rule that the right of pre-emption arises out of a valid and completed sale. The question that has caused some controversy is:

Whether a sale should be treated as completed sale under Muslim law or under the Transfer of Property Act?

In Begum v. Muhammad[25], a full Bench of Allahabad High Court held that if the sale is complete in the Muslim law sense, then the right of pre-emption will arise. In this case, Bannerji, J. expressed the opinion that it arises only when the sale is complete in the Transfer of Property Act sense. In Jadulal v. Janki Koer[26], the Calcutta High Court pronounced the test of intention of parties. In other words, the sale will be deemed to be complete when parties intended it to be completed. This test

was adopted in Budhai v. Sanaullah[27], Kheyali v. Mullick[28], and Sitaram v. Sayed Sirajul[29]. The decision in Sitaram's case was affirmed by the Privy Council[30]. The Supreme Court has resolved the controversy by holding that in those cases, where the Transfer of Property Act applies, the sale will complete in accordance with the provision of the Transfer of Property Act, and Muslim law or any other personal law cannot override the provisions of Act[31]. It may be noted that the Muslim law of sale has been superseded by the Transfer of Property Act.

It has been held in some cases that the court should look into the real nature of transaction. A deed which is called gift (sankalp), if it is in fact a sale, then the right of pre-emption will arise. Similarly, the right of pre-emption will be available in respect of an ostensible usufructuary mortgage which is in fact a sale.

CONFLICTS OF LAW

Religion of Buyer, Seller And Pre-Emptor :

Where the parties to a transaction which gives rise to a case of pre-emption are governed by different personal laws, it is necessary to lay down the principles upon which the court would act. In India all religions are treated with equality and therefore in this branch of the law of principle of reciprocity should be logically applied. Hence, on general principles it would be unfair to apply the law of pre-emption and to create rights in favour of persons who would not be subject to corresponding obligations.

The seller and the pre-emptor must necessarily be Muslim. The vendor should be a Muslim; for there is no reason why the Muslim law of pre-emption should be applied to a vendor who is a non-Muslim. The pre-emptor should also be a Muslim; the reason being that a Muslim if he subsequently wishes to sell the property he will be obliged to offer it to his Muslim neighbour's or co-owners. If, however the right of pre-emption is recognized in favour of non-Muslim, he may take advantage of it as a pre-emptor; but would not be subject to a similar obligation.

As regards the purchaser, there is a conflict of opinion. According to Allahabad and Patna decisions the purchaser need not be a Muslim; while according to Calcutta and Bombay view the purchaser should also be a Muslim.

As between Sunnis and Shias, if a Shia sues a Sunni for pre-emption the Shia law which is the narrower law will be applied; thus a neighbor being a Shia will have no right to pre-empt from a Sunni vendor. A Hyderabad case illustrates the principles to be followed in determining suits where one of the parties is a Sunni and the other a Shia.32 One Abdur Rahman (Hanafi) sold a house to Pasha Begum (also Hanafi). There upon Syed Shabber Hasan (Twelver Shia) filed a suit for pre-emption. The question arose whether the Hanafi or the Ithna Ashari law was to apply. The two questions referred to the Full Bench were formulated as follows :

(1) Whether all suits of pre-emption are to be decided according to the rules of Hanafi law irrespective of the fact that the parties belong to different persuasions?

(2) In case it is held that the personal law of other sects has the force of law then by what law suit would be governed if the person claiming is a Shiite and a Sunnite or vice versa.

The bench consisted of five judges. The majority held that the law of pre-emption in Hyderabad is neither statutory nor customary, nor territorial, nor yet "the common law." The true principle was that Hindu and Muslim laws were applied as personal laws to Hindus and Muslims, respectively. The law of pre-emption has been declared to be a personal law by the Supreme Court, and if the parties are Muslim no question arises and the Muslim law will apply.

As the personal law of each party would apply, what happens if the pre-emptor is of the Shia school and the vendor of the Sunni faith? The following scheme was adopted :

(a) If both the parties belong to one and the same school, the rules of that particular school will apply.

(b) If the vendor is a Shia and the pre-emptor a Sunni then as the Shia law does not recognize the right of pre-emption on the ground of vicinage, applying the principle of reciprocity, the pre-emptor does not succeed.

(c) emptor must fail

It will be recalled that this reasoning is the one put forward by Mahmood J. in the leading case of Govind Dayal v. Inayatullah33, and the majority cited it with approval and adopted the principle of reciprocity as being in consonance with justice and equity.

NECESSARY FORMALITIES

According to the Hedaya 'the right of shufa is but a feeble right as it is disseizing another of his property merely in order to prevent apprehended inconveniences. For this reason the law considers certain formalities as imperative.

Three demands

No person is entitled to pre-empt unless he takes the proper steps at the proper time and conforms strictly to the necessary formalities. These formalities or ceremonies are known as the 'Three Demands'.

The First Demand is taleb-e-muwasabat. The pre-emptor must assert his claim immediately on hearing of the sale, but not before. Witnesses are not necessary, as in the second demand; nor in

is any particular form essential. 'I have demanded or do demand pre-emption' is enough.34The courts enforce this formality strictly; and any unreasonable delay will be constructed as an election not to pre-empt. A delay of twelve hours was in one case considered too long; the principle is that the law requires extreme promptness and any laxity will be fatal to the pre-emptor's claim.

The Second Demand is talab-e-ishhad. The pre-emptor must, with the least practicable delay, make a second demand. He must (i) refer to his first demand;35 (ii) do so in the presence of two witnesses; and (iii) do so in the presence of either the vendor (if he is in possession) or the purchaser, or on the premises. This is also known as talab-e-taqrir, the demand of confirmation.

A common form of the demand is: the pre-emptor says, 'such a person has bought such a house of which I am the pre-emptor (shafi). I have already claimed my privilege of pre-emption and now I again claim it: be yet witness thereof. The property must be clearly specified by the pre-emptor. If the pre-emptor is at a distance and cannot be personally present, the second demand may be made by an agent, or even by a letter. An omission by the agent will bind the pre-emptor. Tendor of the price is not necessary, provided that he offers to pay the agreed price and if that price appears to be fictitious then such price as the court fixes. If there are several purchasers, the demand must be made to all of them unless it is made on the premises or in the presence of the vendor. If however, the demand is made to some only of the purchasers, the pre-emptor can claim his rights as against these purchasers only and not as against the others.

Sometimes, the first two demands may be combined. If at the time of the First Demand the pre-emptor has an opportunity of invoking witness in the presence of the vendor or purchaser or on the premises to attest the First Demand and witness are actually present to testify to this formality, the requirements of both demands are satisfied. This, however, is the only case where the first two demands can be combined lawfully.

The Third Demand is not really a demand but taking legal action and is not always necessary; it is only when his claim is not conceded that the pre-emptor enforces his right y bringing a suit. Such a action is called talab-e-khusumat (the demand of possession, or the demand where there is a dispute). The suit must be brought within one year of the purchaser taking possession of the property if it is corporal; or within one year of the registration of the instrument of sale if incorporeal.36

RIGHT WHEN LOST

The right of pre-emption may be lost by acquiescence, death or release.

ACQUIESCENCE OR WAVIER

The most ordinary form of acquiescence is to omit to take the necessary formalities. S sells land to

B. P, who has the right to pre-empt, on receiving information of the sale omits, without sufficient cause, to claim his right immediately; or makes an offer of the house to B; or agrees to cultivate the land with B. in each of these cases P will be deemed to have acquiesced in the sale and to have lost his right to pre-empt.

DEATH

The right to pre-empt is extinguished if the pre-emptor dies after the first two demands but before filling a suit. The right is extinguished if death occurs during the pendency of a suit, and the action cannot be continued by his legal representatives.37 Under Ithna Ashari and the Shafei laws the right descends to the heirs proportionately.

RELEASE

The right may be destroyed if there is a release for consideration to be paid to the pre-emptor; the right, however, is not lost if there has been a refusal on the part of the pre-emptor to buy before the actual sale, nor by an unwillingness to make an offer to purchase the property after notice that the property was for sale.

OBJECT OF PRE-EMPTION

In the words of Mulla," The right of shufaa or pre-emption is a right which the owner of an immoveable property possesses to acquire by purchase another immoveable property which has been sold to another person". The foundation of the right of pre-emption is the human desire to avoid the inconvenience and disturbance which is likely to be caused by the introduction of a stranger into the land. The Muslim law of pre-emption is to be looked at the light of the Muslim law of succession. Under Muslim law, death of a person results in the division of his property into fractions. If any heir is allowed to dispose of his share without offering it to other co-heirs, then it is likely to lead to the introduction of strangers into a part of the estate with resultant difficulties and inconveniences. In view of this, the law of pre-emption imposes a limitation or disability upon the ownership of property to the extent that it restricts the owner's unfettered right of transfer of property and compels him to sell it to his co-heir or neighbor, as the case may be. The person, who is a co-sharer in the property, or owes property in the vicinity, gets an advantage corresponding to the burden with which the owner of the property is saddled, even though it does not amount to an actual interest in the property sold. It is now an established view that the right of pre-emption is not a mere right to re-purchase; it is akin to legal servitude running with the land. The right exists in the owner of the pre-emption tenement for the time being which entitled him to have an offer of sale made to him whenever the owner of pre-emptional property desires to sell it. It is a right of substitution entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from

the sale under which he has derived his title. It is, in effect, as if in a sale-deed the vendee's name was rubbed out and the pre-emptor's name substituted.[38] Or, in the words of Mahmood J."..... a right, which the owner of certain immoveable property possesses, as such, for the quiet enjoyment of that immoveable property, to obtain, in substitution for the buyer, proprietary possession of certain other immoveable property, not his own, on such terms as those on which such latter immoveable property, is sold to another person". Mukerjee, J. very aptly says that the crux of the whole thing is that the benefit as well as the burden of the right of pre-emption runs with the land and can be enforced by or against the owner of the land for the time being although the right of pre-emption does not amount to an interest in the land itself. The law of pre-emption creates a right which attaches to the property and on that footing only it can be enforced against the purchaser.[39] Thus, the right of pre-emption in that sense is right in rem, its exercise, from the time it arise up to the time of the decree, is restricted as a personal right.

It is a right which is neither heritable nor transferable.[40] In this context, the following passage in the Hedaya is also instructive: "The right of shufaa is but a feeble right, as it is the disseizing another of his property merely in order to prevent apprehended inconvenience". The right of pre-emption is a very weak right and can be defeated by a defendant by all lawful means.[41]

In Indira Bai v. Nandkishore,[42] the Supreme Court observed that the right of pre-emption is a weak right and it can be defeated by estoppels. Even in Muslim law, which is the genesis of this right, as it was unknown to Hindu Law and was brought in the wake of Mohammedan Rule, it is settled that the right of pre-emption is lost by estoppel and acquiescence. Estoppel is a rule of equity flowing out of fairness striking on behavior efficient in good faith. It operates as a check on spurious conduct by preventing the inducer from taking advantage and assailing forfeiture already accomplished. It is invoked and applied to aid the law in administration of justice. But for it great many injustices may have been perpetrated.

CONCLUSION

From the submission given in the article it is clear what sort of a right of pre-emption is. It is of an extreme importance which one has got from law and one's own culture. Thought there are many controversies regarding who can opt for such right, if the sect of a person according to Muslim law is different, and when the right is lost, still it plays an important role as one can use this right can an enjoy sole possession of the entire property without any interference from any one.

In this project I have dealt in dept detail of right of pre-emption regarding when does the right arises, who can claim this right, when the right is lost, what are the formalities. Though after the decisions of Supreme Court the law is settled now and the religion or the sect is no barrier now. The formalities related to this right are also very simple in nature whereby one can approach the vendor alone or with a witness and if the first two demands are rejected than one may knock the

doors of the Courts.

At last we can see that the object of his right is just that, one can enjoy his right over the entire property without any disturbances but his intention should be a fair one in this regard.

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1. AIR (1914) 42 IA 10.

2. (1885) 7 All 775.

3. Ibrahim Saib v. Muni Mir, (1870) MHCR 26.

4. Sayeeduddin Ahmed v. Iunus Mia, PLD 1960 Dacca 416.

5. Supra Note.2

6. Avadh Behari v. Gajadar, AIR 1954 SC 417.

7. Jagannath v. Inderpal, AIR 1935 ALL 236.

8. Supra Note 6.

9. Digamber Singh v. Ahmed, (1915) 37 ALL 129.

10. Bhan Ram v. Baij Nath AIR 1962 SC1976; Sant Ram v. Labh Singh, AIR 1965 SC 314.

11. Supra Note 6.

12. AIR 1958 SC 838. (Dealing with the Punjab Pre-emption Act, 1913).

13. Bibi Saleha v. Hazi Amiruddin, AIR 1929 Patna 214.

14. Karim v. Priya Lal, AIR 1943 Bombay 83.

15. Aziz v. Nazir, AIR 1927 All 504.

16. AIR 1963 Raj 195.

17. Girraj Kumar v. Irafan Ali, AIR 1932 All 688.

18. Dhanraj v. Rameshwar, AIR 1924 All 227.

19. Ibid.

20. Munilala v. Bishwanath, AIR 1968 SC 450.

21. Najm-Un-Nissa v. Ajaib Ali, (1900)

22. All 342. 22 (1916) 37 All 533.

23. AIR 1923 All 57.

24. AIR 1968 SC 450.

25. (1894) 16 All 344.

26. (1908) 35 Cal 575.

27. (1914) 41 Cal 943.

28. (1916) 34 IC 210.

29. (1917) 41 Bom 636.

30. (1921) 44 Bom 1056 (PC).

31. Radhakrishan v. Sridhar, AIR 1960 SC 1368.

32. Pasha Begum v. Syed Shabber Hasan, AIR 1956 Hyd 1.

33. Supra Note 2.

34. C.S.Tiwati v. R.P.Dubey (1949) 28 Pat 861.

35. Ibid.

36. See Article 10, Limitation Act 1963.

37. Mohd. Ismail v. Abdul Rashid AIR 1956 All 1.

38. AIR 1980 Raj 116.

39. AIR 1954 SC 417 at pg 422.

40. Supra Note. 37

41. Supra Note.38

42. AIR 1991 SC 1055.